

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
AMERITECH CORP.,)	
Transferor,)	
)	
AND)	CC Docket No. 98-141
)	
SBC COMMUNICATIONS, INC.,)	EB File No. EB-04-IH-0216
Transferee,)	
)	
For Consent to Transfer of Control of)	
Corporations Holding Commission Licenses and)	
Lines Pursuant to Sections 214 and 310 (d) of the)	
Communications Act and Parts 5, 22, 24, 25, 63,)	
90, 95, and 101 of the Commission's Rules)	

ORDER

Adopted: January 5, 2005

Released: January 7, 2005

By the Commission:

I. INTRODUCTION

1. In this Order, we deny SBC Communications Inc.'s ("SBC's") request that we discontinue the independent auditor condition in Merger Condition XXVII of the *SBC/Ameritech Merger Order* for periods beginning on or after January 1, 2004.¹ Specifically, we find that SBC has not demonstrated that discontinuing this audit condition for the period in question would serve the public interest.

II. BACKGROUND

2. In the *SBC/Ameritech Merger Order*, the Commission adopted the Merger Conditions to mitigate any potential public interest harms of the merger of Ameritech Corporation ("Ameritech") and

¹ *Applications of Ameritech, Transferor, and SBC Communications Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 15034-35, Appendix C, ¶ 66 (1999) ("*SBC/Ameritech Merger Order*" or "*Merger Order*"), vacated in part sub nom., *Ass'n of Communications Entrs. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001); see Letter from Jim Lamoureux, Senior Counsel, SBC Telecommunications Inc., to William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 9, 2004 ("*SBC Request*").

SBC.² These Merger Conditions, to which SBC agreed, included Condition XXVII, the independent auditor condition.³ This condition requires SBC to engage an independent auditor to conduct audits on an annual basis regarding SBC's compliance with the Merger Conditions and the sufficiency of SBC's internal controls.⁴ The *Merger Order* specifically contemplates that the independent auditor condition will permit oversight of SBC's compliance with all the merger conditions. For instance, Commission staff approves the independent auditor and reviews the scope and quality of the independent auditor's work, the independent auditor's final audit report must be publicly filed with the Commission, and the Commission staff has access to the independent auditor's working papers and supporting materials for two years following the submission of the final audit report.⁵ As SBC agreed when the Commission released the *Merger Order*, the independent auditor condition expires when the last of the remaining Merger Conditions subject to this requirement sunsets.⁶

3. On June 9, 2004, SBC requested that the Commission discontinue the independent auditor condition for all periods beginning on or after January 1, 2004.⁷ SBC filed a supplemental letter on July 7, 2004 providing additional information.⁸ On July 13, 2004, the Enforcement Bureau issued a public notice seeking comment on SBC's request.⁹ AT&T Corporation and Premiere Network Services, Inc. filed comments, and various other competitive local exchange carriers ("LECs") filed joint reply comments.¹⁰ These commenters universally oppose SBC's request. SBC also filed reply comments on August 10, 2004.¹¹

² See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14716, 14881, ¶¶ 2, 410; *id.*, 14 FCC Rcd at 14964-15039, Appendix C). We refer to the market-opening conditions in Appendix C as the Merger Conditions.

³ See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14881-84, ¶¶ 406-412.

⁴ *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15034-35, Appendix C, ¶ 66 (requiring an annual examination engagement).

⁵ See *id.*; see also *Delegation of Additional Authority to the Enforcement Bureau*, Order, 17 FCC Rcd 4795 (2002).

⁶ See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15034-35, Appendix C, ¶ 66; *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 17 FCC Rcd 19595, 19597, ¶ 3, n.7 (noting that the independent audit condition does not follow the general sunset date, *i.e.*, 36 months after the merger closing date, because it specifically establishes its own period of applicability).

⁷ See *SBC Request*.

⁸ See Letter from David Cartwright, Director, Federal Regulatory, SBC Telecommunications Inc., to Diana Lee, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 7, 2004.

⁹ See Public Notice, "Enforcement Bureau Seeks Comment on SBC's Request to Discontinue Audit of SBC's Compliance with Merger Conditions," DA 04-2092 (rel. July 13, 2004).

¹⁰ See Comments of AT&T Corporation, filed July 27, 2004 ("AT&T Comments"); Letter from Leo A. Wrobel, President, Premiere Network Services Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, filed on July 16, 2004; Reply Comments of ACN Communications Services, Inc., Adelphia Business Solutions Operations, Inc. d/b/a TelCove, ATX Communications, Inc., Capital Telecommunications, Inc., CTC Communications Corp., CTSI, LLC, DSLnet Communications, LLC, El Paso Networks, LLC, Focal Communications Corp., Gillette Global Network, Inc., d/b/a Eureka Networks, ICG Telecom Group, Inc., Integra Telecom, Inc., Lightship Telecom, LLC, LightWave Communications, LLC, McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., NTELOS Network Inc., PAETEC Communications, Inc., Pac-West

(continued....)

III. DISCUSSION

4. In evaluating SBC's request, we consider whether discontinuing the independent auditor condition would serve the public interest.¹² The purpose of imposing the independent auditor requirement was to provide a cost-effective yet "thorough and systematic evaluation of SBC's compliance with the conditions and the sufficiency of SBC's internal controls" to supplement the Commission's usual investigative authority in ensuring compliance and enforcement of the Merger Conditions.¹³ As discussed below, we find no reason to revisit our decision to impose the independent auditor condition as originally contemplated by the *Merger Order*.

5. In support of its request, SBC makes the general argument that there is no productive reason for the Commission and SBC to conduct further audits for the period under consideration. In particular, SBC contends that most of the conditions have sunset as of June 1, 2004, and the amount of information provided to the Commission through the audit report will be substantially less than in prior years.¹⁴ We disagree with SBC's argument and find no reason to depart from the Commission's previous determinations that the audit condition is in the public interest. The Commission concluded that the SBC/Ameritech merger was in the public interest because the "approval is subject to significant and enforceable conditions."¹⁵ Moreover, the Commission found that "[o]nly a strong corporate compliance program, in conjunction with the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefits of the conditions."¹⁶ The Commission recognized from the outset the importance of the independent auditor condition as an integral component of a successful program to monitor SBC's compliance with the operative Merger Conditions as well as a disincentive to discrimination and other potential misbehavior.¹⁷

6. SBC also contends an audit is not necessary for two of the remaining operative conditions because they merely require SBC to maintain specific discounts for competitive local exchange carriers on previously ordered eligible services for the remainder of the effective period but do not require SBC to

(...continued from previous page)

Telecomm, Inc., RCN Telecom Services, Inc., TDS Metrocom, LLC, and Vycera Communications, Inc., filed August 10, 2004 ("Joint Reply").

¹¹ See Reply Comments of SBC Communications Inc., filed August 10, 2004 ("SBC Reply").

¹² See 47 U.S.C. § 416(b); *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14885, ¶ 415 & n.781 (providing that the Commission may modify the Merger Conditions); see also, e.g., *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorization and Application to Transfer Control of a Submarine Cable Landing License*, Order, 17 FCC Rcd 6982, 6984, ¶ 7 & n.14 (2002) (finding that a temporary suspension of the Bell Atlantic/GTE Merger Conditions would serve the public interest); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Second Memorandum Opinion and Order, 15 FCC Rcd 17521, 17532, ¶ 21 (2000) (finding that SBC's request to modify its Merger Condition is in the public interest).

¹³ *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14884, 14918, ¶¶ 412, 503.

¹⁴ *SBC Request* at 1. SBC states that, with the Enforcement Bureau staff's approval, SBC included two Merger Conditions with a 2004 sunset in the scope of the 2003 independent audit. *Id.*

¹⁵ See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14716, ¶ 2.

¹⁶ See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14882, ¶ 409; AT&T Comments at 12.

¹⁷ See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14821-22, 14881-84, ¶¶ 246-47, 406-12.

take additional action.¹⁸ SBC contends that in the event that it does not maintain these discounts, competitive carriers could file a complaint with the Commission.¹⁹ The Merger Condition, however, placed the burden on SBC, and not the competitive carriers, to take active steps to ensure compliance, including hiring an independent auditor to conduct audits.²⁰ Several commenters observed that relying on the complaint process without an independent evaluation would be unnecessarily burdensome to the harmed party.²¹ They also argue that the Commission is less likely to discover violations through complaints than through the audit process because a harmed party may not have the incentive or resources to file a complaint.²² We agree with these commenters. We see no reason to second-guess our earlier decision that, as a condition for approval of SBC's and Ameritech's merger, SBC should bear the burden of complying with the independent auditor condition for the entire period envisioned in our original order.

7. SBC also claims that, in the absence of audits, other compliance and enforcement mechanisms established in the *Merger Order* would provide adequate assurance of SBC's compliance with the Merger Conditions. In particular, SBC contends that a third operative condition, the nondiscriminatory rollout of digital subscriber line ("xDSL") services condition, is self-policing because SBC continues to file quarterly reports on its compliance with the xDSL deployment.²³ In addition, SBC contends that it will continue to file compliance reports that would "describe SBC's compliance with all open merger conditions that will allow the Commission and others to confirm SBC's compliance with merger conditions."²⁴

8. We reject SBC's claim that its remaining compliance obligations obviate the need for the independent auditor condition. As previously stated, the Commission found that the compliance program protected the public interest, but only in conjunction with the independent auditor condition.²⁵ Quarterly reports and compliance reports are not a substitute for an independent audit. SBC's obligations to file unaudited quarterly and compliance reports do not provide an independent review of SBC's performance. During the audit process, the Commission staff and independent auditor have access to the working papers, supporting materials, and interpretations underlying SBC's compliance assertions that may not be disclosed in the performance reports or available to third parties.²⁶ Finally, when contemplating the merger, the Commission considered the independent auditor condition a useful tool to supplement its

¹⁸ *SBC Request* at 1. The discount conditions are Condition XIV, carrier-to-carrier promotions: unbundled loop discount, and Condition XV, carrier-to-carrier-promotions: resale discount. *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15015-15019, Appendix C, ¶¶ 45-47.

¹⁹ *SBC Request* at 1; *SBC Reply* at 7-8.

²⁰ *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14881, ¶ 406 (stating that the Merger Conditions place responsibility of taking active steps to ensure compliance on SBC by: (1) establishing a compliance program; (2) requiring an independent compliance audit; and (3) setting voluntary payment obligations). The voluntary payment provisions sunset in 2004.

²¹ See *AT&T Comments* at 13-14; *Joint Reply* at 20-22.

²² See *AT&T Comments* at 13-14 (stating that the difference between the small discount amount available compared to the high cost of pursuing a complaint and the time expended in such complaints serves as a deterrent to filing any formal complaint); *Joint Reply* at 22.

²³ *Id.*; *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14999, Appendix C, ¶ 22.

²⁴ *SBC Request* at 1; *SBC Reply* at 8.

²⁵ *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14881, ¶ 406.

²⁶ See *AT&T Comments* at 14-16; *Joint Reply* at 20-21.

usual investigative authority²⁷ and found that the “findings in the auditor’s report, or review of the auditor’s working papers, could form the basis of enforcement actions.”²⁸ In view of the foregoing, we find no reason to alter our prior conclusion that the compliance mechanisms discussed in SBC’s request are not substitutes for the independent auditor condition.

9. Lastly, SBC contends that we should discontinue the audit requirement because “the cost of the audits for the years 2004 and beyond would cost at least one million dollars,” and “the burdens of continued audits clearly outweigh any possible benefits.”²⁹ We find this contention unpersuasive. The Commission specifically found that “the audit requirement establishes an efficient and cost-effective mechanism for providing reasonable assurance of SBC/Ameritech’s compliance with the conditions.”³⁰ SBC has not provided substantial evidence to contradict this finding. We conclude that, therefore, SBC has not demonstrated that discontinuing the independent auditor condition would serve the public interest.

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to sections 1-4, 201-205, 214, 251, 303(r), 309, and 416(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 214, 251, 303(r), 309, and 416(b) that SBC Communications Inc.’s request that the Commission discontinue requiring audits under Condition XXVII of the *SBC/Ameritech Merger Order* is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁷ See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14918, ¶ 503. See also AT&T Comments at 17; Joint Reply at 21-23.

²⁸ See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14882-83, ¶ 410; AT&T Comments at 12.

²⁹ *SBC Request* at 2; *SBC Reply* at 7.

³⁰ See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14882, 14884, ¶¶ 409, 412; AT&T Comments at 4, 17; Joint Reply at 20.